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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

DENNIS KEITH ZAMEK,

Defendant and Appellant.

B211017

(Los Angeles County
Super. Ct. No. BA337724)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Jose I. Sandoval, Judge. Affirmed.

Mojgan Aghai, under appointment by the Court of Appeal, for Defendant and
Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Susan D.
Martyneec and Robert C. Schneider, Deputy Attorneys General, for Plaintiff and
Respondent.

Following his attack on Sol Mena, Dennis Zamek was convicted by a jury of assault by means of force likely to cause great bodily injury (Pen. Code, § 245, subd. (a)(1)).¹ In a bifurcated proceeding Zamek waived his right to trial and admitted he had suffered a prior serious or violent felony conviction within the meaning of the “Three Strikes” law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)). The trial court sentenced him to an aggregate state prison term of eight years (double the upper four-year term). On appeal Zamek contends the trial court abused its discretion in excluding his medical expert’s testimony and violated his constitutional right to present a defense. We affirm.

FACTUAL BACKGROUND

On the afternoon of January 11, 2008 Zamek was sitting outside the post office when Mena’s father dropped her off and drove away. As Mena entered the post office, Zamek made derogatory remarks about her body. Mena, then 20 years old, was not acquainted with Zamek and did not respond to his insults. When Mena left the post office minutes later, Zamek resumed his verbal abuse. Mena became frightened. Although still ignoring Zamek, she hurried toward her father’s truck, followed by Zamek. Mena reached the truck, yelled for her father and got into the passenger side.

After Mena entered the truck, Zamek forced the door open and pulled her by her legs and hair. Zamek then threw Mena to the pavement. Mena fell three feet to the ground and injured her elbow. Zamek began punching Mena in the mouth and repeatedly kicked her in the abdominal area.

As a result of the attack, Mena sustained cuts inside her mouth, scratches on her face, bruises to her stomach and an injury to her elbow that left a scar. Mena’s kidneys are congenitally defective and anomalously positioned in the front of her abdominal area. The attack caused Mena to vomit frequently. Photographs of Mena’s injuries were admitted into evidence. Paramedics examined Mena’s injuries at the scene; she declined to be transported to the hospital.

¹ Statutory references are to the Penal Code unless otherwise indicated.

Mena's father testified he saw Zamek kick Mena and punch her several times in the face and abdominal area. He corroborated Mena's account of the attack and description of her injuries.

Zamek did not testify in his own defense. The defense evidence consisted of three photographs taken by Mena's father of Zamek and the area of the assault.

DISCUSSION

At trial defense counsel contended Mena was lying about the nature of her physical encounter with Zamek and argued his client was guilty of, at most, simple assault (§ 241), not assault by means likely to produce great bodily injury (§ 245, subd. (a)(1)).² In support of the defense theory Zamek sought to introduce expert testimony from a physician describing the type of physical force that is likely to produce great bodily injury and opining that, if Mena had in fact been attacked by Zamek in the manner she described, her injuries would have been more severe. The People objected to this testimony; and, after hearing argument, the trial court did not allow it.³

As with other evidentiary issues, the trial court exercises broad discretion in determining the admissibility of expert testimony; its ruling will not be disturbed on appeal absent a manifest abuse of discretion. (*People v. Robinson* (2005) 37 Cal.4th 592, 630.) Here, the trial court did not abuse its discretion in ruling the proposed testimony was not a proper subject for expert testimony because (1) understanding or appreciating the type of physical force likely to produce great bodily injury is sufficiently within the

² Section 245, subdivision (a)(1), provides, "Any person who commits an assault upon the person of another with a deadly weapon or instrument other than a firearm or by any means of force likely to produce great bodily injury shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not exceeding one year, or by a fine not exceeding ten thousand dollars (\$10,000), or by both the fine and imprisonment."

³ The trial court announced its tentative ruling to deny the defense request and stated it would make a final ruling later that day or the following day. Although no final ruling is reported, the parties plainly understood the court had adopted its tentative ruling as its final ruling.

common experience of the jurors (see Evid. Code, § 801); and (2) the testimony would incorrectly suggest the likelihood of great bodily injury within the meaning of section 245, subdivision (a)(1), is to be determined solely by the extent of the injuries actually inflicted.

Evidence Code section 801 permits introduction of an expert's opinion only when it is "related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." (*People v. Gonzalez* (2006) 38 Cal.4th 932, 944.) "On the other hand, 'expert opinion is not admissible if it consists of inferences and conclusions which can be drawn as easily and intelligently by the trier of fact as by the witness.'" (*People v. Valdez* (1997) 58 Cal.App.4th 494, 506.)

Proof of the elements of certain crimes may require the assistance of an expert opinion. For example, in cases charging rape of a person who, through mental disorder, is incapable of giving consent (§ 261, subd. (a)(1)), expert testimony is admissible to establish the victim was incapable of giving consent. (See *People v. Lewis* (1977) 75 Cal.App.3d 513, 518-519.) Similarly, expert testimony is admissible as to the composition of a bullet-proof vest to prove a violation of section 12370, subdivision (a) [possession of body armor as a felon]. (See *People v. Chapple* (2006) 138 Cal.App.4th 540, 548-549.) And expert testimony about the culture and habits of criminal street gangs is admissible in cases alleging criminal street gang enhancements or penalties under section 186.22. (See *People v. Gonzalez, supra*, 38 Cal.4th at p. 944.) In this case, however, the trial court reasonably concluded the proposed testimony as to the types of force likely to produce great bodily injury was no more helpful to the jury's ultimate decision than was each juror's individual knowledge of, or experience with, various types of physical force and likelihood of resulting injury. No abuse of discretion was shown.

Additionally, a trial court "may . . . exclude testimony in the form of an opinion that is based in whole or in significant part on matter that is not a proper basis for such an opinion." (Evid. Code, § 803.) "Under [Evidence Code] Section 803, as under existing law, an opinion may be held inadmissible or may be stricken if it is based wholly or in substantial part upon improper considerations." (Cal. Law Revision Com. com., 29B

pt. 3A West’s Ann. Evid. Code (2009 ed.) foll. § 803, p. 151.) As the trial court explained, the proposed expert testimony could have confused or misled the jury into believing the aggravated nature of the assault turned on the nature and extent of Mena’s injuries, when “[i]t is the likelihood, not the actual production of injury, which is the focus” of the offense. (*People v. Roberts* (1981) 114 Cal.App.3d 960, 964.) Indeed, section 245, subdivision (a)(1), does not require the victim to suffer any injury; if inflicted, the nature and extent of the victim’s injury, although relevant, is not conclusive as to the degree of force used. (See *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028; *People v. Russell* (2005) 129 Cal.App.4th 776, 782.) The issue, therefore, was not whether Mena in fact suffered serious injury, but whether the use of force she attributed to Zamek was such as to have likely caused her serious injury. (*Roberts* at pp. 964-965 [kick to forehead could have struck eye and produced blindness in that eye, a great bodily injury]; see also *Aguilar* at p. 1028.)⁴ Here, too, the trial court did not abuse its discretion in excluding the proposed testimony. (See general *People v. Mickey* (1991) 54 Cal.3d 612, 688.)

Zamek’s federal constitutional argument is similarly devoid of merit. Although “[f]ew rights are more fundamental than that of an accused to present witnesses in his [or her] own defense,” the right to present a defense is not unlimited. (*Chambers v. Mississippi* (1973) 410 U.S. 284, 302-303 [93 S.Ct. 1038, 35 L.Ed.2d 297].) A trial court retains wide latitude to exclude evidence that is repetitive or only marginally relevant or poses an undue risk of prejudice or confusion of the issues. (*Crane v. Kentucky* (1986) 476 U.S. 683, 689-690 [106 S.Ct. 2142, 90 L.Ed.2d 636].) “‘As a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused’s [constitutional]

⁴ “That the use of hands or fists alone may support a conviction of assault ‘by means of force likely to produce great bodily injury’ is well established . . .” (*People v. Aguilar, supra*, 16 Cal.4th at p. 1028; see also *In re Nirran W.* (1989) 207 Cal.App.3d 1157, 1161-1162; *People v. McDaniel* (2008) 159 Cal.App.4th 736, 748-749.) Similarly, a defendant’s act in kicking the victim with shod feet has been found sufficient to support a conviction for assault by means of force likely to product great bodily injury. (*Aguilar*, at pp. 1027, 1035-1036.)

right to present a defense. Courts retain . . . a traditional and intrinsic power to exercise discretion to control the admission of evidence in the interests of orderly procedure and the avoidance of prejudice.’’ (*People v. Cudjo* (1993) 6 Cal.4th 585, 611.) Because the trial court did not abuse its discretion in applying well-established and reasonable rules of evidence to exclude the proposed expert opinion, no constitutional violation occurred.

DISPOSITION

The judgment is affirmed.

PERLUSS, P. J.

We concur:

ZELON, J.

JACKSON, J.